91-687

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In The
Supreme Court of the United States
October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD G. IMLAY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER STATE OF IDAHO JOINED BY: ALASKA, ARIZONA, CONNECTICUT, DELAWARE, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEVADA, NORTH DAKOTA, PENNSYLVANIA, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WYOMING

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INTERESTS OF *AMICI CURIAE* STATES

The State of Idaho, and the 19 other *amici* states and commonwealths, through their respective Attorneys General, appear on behalf of their citizens and file this brief pursuant to Rule 37 of the rules of this Court. The *amici curiae* administer criminal justice systems within their jurisdictions to promote the safety and welfare of their citizens. The holding of the Supreme Court of Montana construes the right against self-incrimination stated in the Fifth Amendment of the United States Constitution, which applies to all states. The holding fails to preserve the integrity of the decisions of this Court, and threatens to establish an ill-founded trend against appropriate sentencing for sex offenders.

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SUMMARY OF ARGUMENT

The Montana Supreme Court's holding that a probationary condition which requires sexual offender treatment necessarily compels a sex offender to make statements in violation of the Fifth Amendment is contrary to the well-established decisions of this Court. The Fifth Amendment protection against self-incrimination is not available to an offender with respect to statements about the crime of which he was convicted when the statements are not compelled testimony, but are made to a therapist or counsellor for treatment purposes only. The statements, which constitute evidence of the offender's willingness to take responsibility for the crimes of which he was convicted, would not incriminate the offender in future criminal proceedings.

Further, a probation revocation proceeding is not a criminal proceeding during which the probationer's Fifth

Amendment rights may be asserted with respect to statements or silence in response to questions required as a probationary condition. An offender's refusal to discuss the acts for which he was convicted and the resulting failure to successfully complete treatment are therefore properly considered by the sentencing court as a basis for revocation of a suspended sentence.

The probationary condition imposed in this case was an appropriate and important attempt to treat or rehabilitate a convicted sex offender. The Montana Supreme Court's erroneous analysis and conclusions conflict with precedents of this Court and threaten the availability of any sentence requiring similar treatment.

REASONS FOR GRANTING THE WRIT

I. The Montana Supreme Court Erroneously Applied Fifth Amendment Protections to a Treatment Situation.

Donald Imlay was convicted by a jury of sexual assault of a 7-year-old girl and given a five-year suspended sentence on the condition that he complete sex offender treatment. He came back before the state district court on a petition to revoke his suspended sentence after he failed to fulfill the condition requiring completion of a sex offender treatment program. During his initial meetings with a therapist, Imlay had maintained that he did not commit the acts for which he was convicted by a jury. Because of his denial, Imlay was eventually denied further participation in treatment. At the probation revocation hearing, Imlay continued to maintain his innocence.

On appeal, the Montana Supreme Court concluded that Imlay was penalized because of his refusal to "confess" to the crime and that the Fifth Amendment protects against such procedures by the state. The state court failed to recognize the context in which Imlay was required to discuss the acts of which he had been convicted and rendered an opinion that is in conflict with decisions of this Court and others on at least three rules of law.

First, Imlay's silence occurred in a setting designed to provide treatment and rehabilitation. The therapy required as part of the sentence is not part of the adversary system and its purpose is not to extract incriminating statements from sex offenders. Where the purpose of a proceeding is to provide treatment, not punishment, the Fifth Amendment right against self-incrimination does not arise. *Allen v. Illinois*, 478 U.S. 364 (1986); *Taylor v. Best*, 746 F.2d 220 (4th Cir. 1984); *Ryan v. State of Montana*, 580 F.2d 988 (9th Cir. 1978); *but cf. Asherman v. Meachum*, 932 F.2d 137 (2d Cir. 1991), *reh'g en banc pending*.

Second, any discussion during treatment between Imlay and his therapist could not lead to Imlay's giving compelled testimony or answers. The Fifth Amendment protects statements made in a context where the declarant has been coerced or threatened with a penalty in the event he exercises the right to remain silent. In this case, Imlay was neither coerced nor faced with impermissible choices. He had already been convicted of the crime for which the treatment program required that he accept responsibility. His choices consisted of either discussing with a therapist the acts of which he was convicted and suffering no further criminal exposure, or maintaining his innocence and facing potential probation revocation. The choices are not of the type considered impermissible by

this Court. *See Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

As stated in *Minnesota v. Murphy*, 465 U.S. 420 (1984), the fact that a probationer's answers to questions may be the basis for revocation of probation does not lead to the conclusion that the answers were compelled and the process violative of the Fifth Amendment. The requirement that a probationer discuss matters that affect his probationary status does not give rise to a self-executing privilege against self-incrimination. The deciding factor is whether the discussion calls for answers that would incriminate the probationer in future criminal proceedings.

> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. ... [N]othing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated. *Lefkowitz v. Cunningham*, *supra*, 431 U.S., at 808, n.5, 97 S.Ct., at 2137, n.5. *See Baxter v. Palmigiano*, 425 U.S. 308, 317-18, 96 S.Ct. 1551, 1557-58, 47 L.Ed.2d 810 (1976).

Minnesota v. Murphy, 465 U.S. at 434 n.7.

Third, the discussion took place after Imlay's conviction and the discussion pertained only to the

criminal acts for which Imlay was convicted. Because the Fifth Amendment shields only statements that would incriminate a person in future criminal proceedings,[1] Imlay's discussion of the crimes of which he had already been convicted would not be considered violative of the Amendment's protections.[2]

As stated by the Vermont Supreme Court in *State v. Gleason*, 576 A.2d 1246 (Vt. 1990):

> [T]he imposition of sentence extinguishes the privilege against self-incrimination with respect to the crime of which the accused is convicted and, because of the protection against double jeopardy, defendant faces no threat of subsequent prosecution for the offense.

576 A.2d at 1250. Gleason asserted that a probationary condition imposed as a part of his suspended sentence was violative of his Fifth Amendment rights. The condition required that Gleason discuss his sexual behavior and the sexual offenses of which he had been convicted. Relying on this Court's decision in *Minnesota v. Murphy*, the Vermont court ruled that the condition did not infringe upon Gleason's rights and that his refusal to

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[1]The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, *where the answers might incriminate him in future criminal proceedings*." [Emphasis in original.] *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

[2]Similarly, a grant of immunity would be useless as applied to statements regarding a prior conviction and would therefore not resolve the issue at hand.

discuss the criminal acts was a proper basis for revoking his suspended sentence.

> Special condition 21(a), however, required defendant to discuss matters relevant only to his probationary status and his prospective rehabilitation. The special condition did not take the extra, impermissible step of compelling defendant to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. ... The only sexual offenses that 21(a) required defendant to explore were those for which he had been convicted.

576 A.2d at 1251 (footnote omitted). *See also McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986), *cert. denied*, 481 U.S. 2203 (1987); *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981) (witness who has been found guilty of certain actions is no longer entitled to claim Fifth Amendment privilege with respect to those matters and may be compelled to testify about them). Here, as in *Gleason*, the Fifth Amendment does not apply to a discussion of acts that gave rise to the charge of which Imlay was convicted.

Thus, in this case Imlay could not assert a Fifth Amendment right to avoid discussing his participation in the crime for which he was convicted with a therapist as part of a probation requirement. Similarly, he could not assert the right at a probation revocation hearing to avoid discussing his failure to fulfill the conditions of his probation, i.e., his failure to complete the required sexual offender treatment. *Minnesota v. Murphy*, 465 U.S. at 434 n.7 (1984).

The Montana Supreme Court also mischaracterized the result or effect of Imlay's continued denial and

eventual probation revocation. Noting that Imlay was sent to prison upon revocation, the court stated that he was penalized for maintaining his innocence. In reality, however, Imlay was sent to prison upon his failure to fulfill the conditions which made him a candidate for supervised release. Revocation of probation, free from due process violations, is a valid exercise of a court's power to terminate a supervised community-based course of rehabilitation. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The threat of revocation of probation due to failure to fulfill conditions cannot be equated with the threat of economic sanctions upon valid assertion of Fifth Amendment rights. *Minnesota v. Murphy*, 465 U.S. 420 (1984). As stated above, there can be no valid assertion of Fifth Amendment rights in this case.

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II. Failure by a Court to Recognize the Legal Propriety and Therapeutic Necessity of Requiring Discussion of Criminal Acts During Treatment Jeopardizes Any and All Treatment Programs Which Require Acceptance of Responsibility by an Offender.

The condition imposed as a part of Imlay's suspended sentence that he obtain and complete sexual offender treatment was reasonably related to his crime of sexual assault. In an attempt to provide alternatives which would benefit society, as well as the defendant, the original sentencing court issued a sentence not unusual in courts attempting to deal with cases involving sexual offenses. It imposed a prison sentence, but suspended the sentence on conditions, including the most pertinent condition of completion of a sex offender treatment program.

During Imlay's sexual offender treatment, the therapist eventually required discussion of the sexual acts of which

Imlay had been convicted. Such discussion is considered evidence of an acceptance of responsibility for the acts and is widely accepted in the sexual offender therapy professions as a prerequisite to treatment of a condition or personality trait which often leads to criminal sexual behavior. Patrick Carnes, *Out of the Shadows; Understanding Sexual Addiction* (Comp Care Pub., Mpls., MN, 1983).

Given the Montana Supreme Court's conclusion that a treatment program which requires discussion of the sexual acts that are the basis for the conviction is violative of the offender's rights, even inpatient treatment which requires such discussion is precluded. As a result, both the state and sex offenders suffer the loss of the availability of meaningful treatment programs which deal with the causes and effects of criminal sexual behavior. Such an effect is completely contrary to the goals of rehabilitation.

In *Russell v. Eaves*, 722 F. Supp. 558 (E.D. Mo. 1989), a prisoner in Missouri challenged the use of a sex offender treatment program which required discussion of the participants' crimes and completion of the program prior to parole eligibility. In finding no violation of the prisoner's Fifth Amendment rights, the federal district court stated:

> The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Court has also held that the fifth amendment protects against compelled testimony in <u>any</u> proceeding "where the answers might incriminate [the witness] in future criminal proceedings." *Allen [v. Illinois]*, 478 U.S. at 368, 106 S.Ct. at 2991. Plaintiff's situation does not jeopardize any

> of the above guarantees. First, MOSOP [Missouri Sexual Offender Program] is not a criminal proceeding, but a clinical rehabilitative program. Second, plaintiff's "testimony" is not compelled. He can refuse to participate in MOSOP. Finally, plaintiff has already been convicted of the crime for which MOSOP requires he accept responsibility. [Emphasis in original.]

722 F. Supp at 560.

It is arguable that the rationale relied upon by the Montana Supreme Court could be used to attack programs that require offenders to discuss substance abuse involved in the commission of crimes, even though it is a well-known and accepted principle of substance abuse treatment that denial must be dealt with before treatment can be continued. In that way, the *Imlay* decision could jeopardize court-ordered drug and alcohol abuse programs.

The ramifications of the Montana Supreme Court's decision in this case are devastating and widespread. Without a well-reasoned holding consistent with this Court's Fifth Amendment decisions, the efficacy of sex offender treatment programs and other similar treatment programs is tenuous. The Court should take this opportunity to make clear that such programs are not violative of a person's rights and should be continued as valid rehabilitative tools.

CONCLUSION

The *amici curiae* states and commonwealths respectfully request this Court to grant the State of

Montana's petition for writ of certiorari. The decision of the Montana Supreme Court is in direct conflict with the holdings of this Court and others regarding the application of the Fifth Amendment.

Respectfully submitted,

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